THE FEDERAL TRADE COMMISSION LAW

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The political and economic considerations which confronted the sixty-third Congress were most unusual. Their counterpart had not occurred within a generation. The extraordinary effect of these conditions was probably only equaled by the dynamic nature of the questions which are pressing to the front in the Congress just assembling as these lines appear.

The sixty-third Congress made a legislative attempt to overtake the advances which public opinion, wise or otherwise, had made in economic thought in the past twenty-five years. Twenty-four years' experience with varying desultory and active efforts to enforce the provisions of the Sherman Anti-trust Law, our marvelous corporate development, and our fatuous belief in the curative efficacy of legislation, coupled with our experience and what was believed to be the judgment of the country, suggested that certain practices which had developed scandal in some corporate managements be made unlawful. It was believed that the responsibility of the guilty individual should be made a little more certain.

There was a well founded feeling that the trust laws should be liberalized to the extent that an individual or corporation injured from what either believed to be an unlawful combination to restrain or monopolize interstate trade or commerce need not wait upon the processes of the Department of Justice, but that independent action in the courts should lie at any time. It was also felt that the right of action for damages to the individual should be permitted to await without limitation the determination of a government suit against an unlawful combination. Further, a liberalization of process seemed wise in order that service might be had wherever the business was being carried on.

Objects or Ends of the Trade Commission Law

Beyond the subjects previously mentioned, certain other substantive matters which were believed to tend to the development of

monopoly were made unlawful by the provisions of the Clayton Act. These are sections two, three, seven and eight of the Clayton law and relate, respectively, to certain forms of discrimination in price, so-called tying contracts, certain forms of intercorporate stockholding, and common or interlocking directors in certain corporations. These will be again referred to.

The Clayton law is a part of the anti-trust laws of the country. The Federal Trade Commission law is not an anti-trust act. The Trade Commission law marks probably the high tide of governmental attempts at legislative regulation of business conduct in interstate commerce. As the act passed the House, it carefully omitted many provisions which have been since heralded as the great constructive enactments of the law. On the final vote in the Senate the law passed by a bare quorum. The act was almost completely rewritten in conference between the two Houses of Congress. If ever a conference committee took liberties with pending legislation, it was done in making the final draft of this law.

The President in his address to Congress after referring to the uncertain meaning of the anti-trust laws had said:

> The opinion of the country would instantly approve of such a commission (Interstate Trade Commission). It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

It is apparent to students of present-day economics that a very real conflict is on in this country between two alliteratively designated economic theories—competition—coöperation. The results of this contest no man can foresee. A corporation, sometimes defined as "a body without decay, a mind without decline," is but the physical expression of a more or less comprehensive development of coöperative capital and business ability. While I believe that this country is committed to the principle of competition, it is daily becoming more evident that this principle must be understood with certain limitations. Unrestrained and unregulated competition logically leads to monopoly. The adage that "Competition is the

life of trade" is faulty for the lack of a qualifying adjective. "Honest competition is the life of trade."

As it appears to me, one of the designs of the Trade Commission law is to modify the centrifugal force of individualism while at the same time holding a check upon the centripetal tendency of coöperation; holding these forces in balance, as it were, much like their counterparts are held in the physical world; to make them both serve the common good.

Unfair Methods of Competition

The limitations of this paper will not permit an extended discussion of all of the phases of this law. One of its most important provisions is that relating to what is described as "unfair methods of competition." Manifestly, "unfair competition" is the substantive thing itself while "methods" are the means used to accomplish the unfair end.

"Unfair competition" has long been a familiar term in the law, while "unfair methods of competition" are yet to be catalogued and described. The legal problems relating to unfair methods of competition are measurably new in the law. They are intricate and complex. Whether or not a code of business ethics will develop from the working out of section five of this law remains for the future.

All lawyers know that what is described in the law as the Law Merchant is merely the codification into written statutes of the laws or rules of merchants in the great marts of trade which in their dealings one with another had come to be their expression of fair dealing; in other words, the rules of the game. After these rules had been developed and had come to meet practical agreement among upright and scrupulous merchants they were written into the laws of the land and have come down to us with infrequent and moderate changes as the Law Merchant. These laws were the development of centuries.

No unfair or dishonest practice will long survive the condemnation of the men engaged in that trade. The men engaged in business make the rules of the game, legislatures and courts to the contrary notwithstanding. The most that legislative bodies do or can do is to write into statute law more or less imperfectly what the great body of business men regard as the approved rules of practice

among intelligent and high-minded business men. Legislative bodies rarely initiate laws.

This feature of the law was the subject of most exhaustive debate in the Senate of the United States. Whether from this or from some other reason it was most left in doubt. As it was not in the House bill, the subject had scant consideration there. Numerous attempts to secure a definition of unfair competition were made and one attempt failed by only two votes. The objections to attempting such definitions were, in short, that the ingenuity of the American business man, advised by some portion of the American bar, would be equal to inventing methods almost or quite as fast as they could be defined.

In this day of trans-oceanic telephone talks we cannot wait with patience the corrective processes of business as applied to itself. This legislation gives over to the Federal Trade Commission the task of developing this code of higher business ethics and, by its orders and proceedings to enforce them, it is proposed to develop this supplementary code to the Law Merchant.

Fair competition, in the more popular sense in which it is doubtless intended in this legislation, is that which obtains in the daily endeavor of the business man to succeed by the peaceful and honest use of his skill and industry to the development of his business without taking or endeavoring to take any undue or secret advantage over either competitors or the public. And the same rule which applies to the individual business man is equally applicable to industry in corporate form.

Unfair competition as instanced and condemned by proceedings in equity is unlawful regardless of the method used. The restriction in the law to "unfair methods" may seriously handicap the activities of the commission, adversely or advantageously, depending upon the point of view. Methods which in themselves it would be disastrous to condemn may in some instances be used to accomplish the result aimed to be prevented.

Then again, a method of competition which might be unfair in one industry or trade might very properly be without any basis of criticism when used in a different industry or line of commerce. Bricks are not apples and there are many differences in the customs of trade in cotton goods as distinguished from the trade in coal. The methods of distribution and sale, the public demand, customs and

characteristics of the industry, its proximity to market, the relation of the product to human needs and many other considerations would all have to be taken into consideration in determining whether the methods used amounted to unfair competition or not.

"Palming off" or the substitution of one's goods for the goods of another is very generally given as one of the most common instances of unfair competition. This is but simple dishonesty and deceit. The imitation of a rival's trade name or his mark or package is another instance. This is commercial piracy. The actual goods of a competitor may be copied or imitated in such a manner as to be unfair competition. But serious difficulties are found in all these cases. As to some simple articles of commerce, for instance, thread or soap, form and appearance may be about all the distinguishing characteristics which such articles may have and it is sometimes very hard to determine that an article is put out with the intention to pirate upon the reputation of a well-known similar article. Square cakes of glycerine soap are likely to look much alike and a spool of white thread looks much like another spool of white thread, yet some of the hardest fought litigation recorded in the law books on the point of unfair competition have been about soap and thread.

Intent may or may not be the controlling factor in this class of cases. It was said by the Supreme Court of the United States in Lawrence Manufacturing Company *v.* Tennessee Manufacturing Company, 138 U. S. 537 that: "The deceitful misrepresentation or perfidious dealing must be made out, or be clearly inferable from the circumstances." In other words, the maxim that fraud must be proven stands. It seems clear that unfair competition or unfair methods of competition is a species of fraud. It is true that we have refined and refurbished the equitable maxims upon which many practices have been enjoined in equitable proceedings in unfair competition cases, mainly, however, in relation to trade-mark law, which logically appears to be but a part of the more comprehensive term of unfair competition.

It was stated in Wrisley Company *v.* Iowa Soap Company, 122 Fed., 796, that deceit is an indispensable element of unfair competition. It seems that this must in the very nature of things be so. It also appears to be good logic that the deceit must be designed and reasonably effective or reasonably calculated to be effective

before equity will intervene. The writer recognizes the fact that there are numerous cases which stop short of this conclusion. One's sense of fair play is not a bad guide as each case must be considered with a full appreciation of all the facts and the customs and practices in the particular trade or industry.

Many of the cases of unfair competition have arisen in the endeavor to protect trade-marks, trade names and that elusive but much sought for business or trade asset known as good-will. In the early days when these things were personal, that is attached to a single individual or family succession, their economic aspect was not what they are in these days of corporate prominence in industry and trade. Now trade names and marks are more highly specialized, advertised and in many instances capitalized. It is doubtful if corporate good-will or any other intangible asset should ever be permitted to be capitalized; rather should corporate stock represent tangible assets. Good-will, patents, trade-marks and the like may put the stock above par in the market but the tangible assets should ever represent the par value of the stock issued. Many of the sound commercial and manufacturing establishments decline to carry patents, trade-marks or good-will into capital account thus setting a high standard of fair competition to their competitors.

Is it an unfair method of competition to capitalize a trade-mark or trade name? Are profit-sharing contracts made with the trade unfair methods of competition? Are coupons, or trading stamps, or profit-sharing devices held out to the ultimate buyer and consumer unfair methods of competition? Is price-cutting of a highly advertised article in order to promote the sale of other goods an unfair method of competition? These and sundry other questions relating to phases of this subject are likely to be answered from the point of view of the interest to be affected.

The admitted evils of competition are gradually coming to be recognized as growing out of dishonest or unfair competition. Dishonest or unfair competition, or, as expressed in the Trade Commission law, unfair methods of competition, is on careful analysis found to consist mainly in some form of untrue, deceptive, or misleading publicity. Fundamentally, unfair competition is proven by dishonest advertising. The printed page, poster, painted sign, or the flashing sign which winks at you in the middle of the night are only forms of advertising. The shape, color, marks, brands,

tags, and even the fastenings of a package of merchandise, are often used as the identifying agents and help to advertise the product to the public. The silent substitution by a dishonest merchant of something else for the goods called for is a form of advertising. The hiring away of the employees of a competitor in order to steal trade secrets is dishonest advertising. The employer in this instance is advertising to the employee of his competitor that if he will come to him that his condition and success in life will be promoted. These extreme examples are cited to show that if you will dissect the circumstances of trade practices which have been denounced by the courts as unfair, it will be discovered that advertising was often the fundamental agency used.

Advertising is of recent growth and is a marvelous factor in the wider distribution of commercial products. Its principles and its legitimate uses are not yet fully developed. As a by-product, it largely supports our wonderful output of periodical literature. But for advertising, Mrs. Blank of Podunk would never make her dress from the same pattern from which is fashioned the gown of the Broad Street belle.

The men who are administering this great civilizing and industrial force are coming to realize that it must have for its basis no less an enduring foundation than truth. Great newspapers and magazines are guaranteeing their readers against loss from reliance on statements appearing in their advertising columns. A number of states, about thirty-two I believe, have laws making untrue, misleading, or deceptive statements of fact in advertising punishable by the criminal courts. This is, of course, supplemental to the civil remedy of those misled and of the right of every trader to protect himself against unfair competition carried on by the same means. These state laws apply only to commerce carried on within a state. Will or may the Trade Commission apply the same rules to the conduct of interstate trade and commerce? If so, is it possible for the commission to perform this work better or as well as the influences directly engaged in the business?

Proof of the violation of the announced principle of law as to unfair competition is furnished by untrue, deceptive, or misleading statements of fact which attempt to inform the public: (1) By whom an article of merchandise is made; (2) where it is manufactured; (3) of what it is made; (4) to what purpose or use it is

adapted; (5) by whom the article is for sale. An analysis of any advertisement respecting merchandise will show that one or all of the above elements always appear.

It is to be remembered that, while untrue or deceptive representations stated in positive or affirmative form as to all these matters are possibly capable of being held violations of the law against unfair competition, the same results are often attempted by innuendo, by indirection, and by negatively stated claims. Any statement, no matter how framed or how subtly stated or ingeniously carried out, which is designed or is reasonably calculated to deceive or defraud or to harm, speaking in a legal sense, the lawful business of another, is evidence of unfair trade.

Unfair Competition Under the Sherman Law

There is good argument in support of the contention that the phrase "unfair methods of competition," undefined as it is in the Trade Commission law, may not be broader than the provisions of the Sherman law; that it may be by the courts held to include only the common law meaning involved in the practices of "palming off" and trade-mark and trade name piracy.

A very great many of the practices generally condemned, and this Trade Commission law held out as affording protection against, have been enjoined by the federal courts in decrees under the Sherman law. And it must be remembered that with the enforcement of the Sherman law, the Trade Commission has nothing to do, save as it may be called upon by the courts, if they so wish, to act as a master in chancery in anti-trust suits, or upon the request of the President or either House of Congress to investigate and report upon the facts of any reported violation of the anti-trust acts by any corporation, or to, on its own initiative, or on request of the Attorney General, investigate the manner in which decrees in anti-trust suits are carried out.

In the decree against the American Thread Company, rendered in June, 1914, under the Sherman law, the defendants were enjoined:

From having by any agreement or understanding any list of wholesalers or retailers with whom trade in sewing thread shall not be carried on.

From purchasing competing plants or brands or from acquiring any interest, by stock ownership or otherwise, in the business of competitors.

From fixing by agreement with competitors trade discounts, rebates, terms or conditions of sale or credit, in connection with the sale or shipment of sewing thread.

From exacting of any purchaser any agreement to maintain a fixed or minimum price, or refusing to trade with, or discriminating against any purchaser because of the prices at which he sells thread, unless he is selling or offering to sell at less than cost.

From giving any bonus or rebate contingent upon the aggregate of future purchases.

From coöperating with or assisting dealers to pool their orders for the purpose of securing discounts or concessions.

From using "fighting brands," defined to be brands revived or used for the purpose of being offered to customers of competitors at cut prices.

From employing "flying squadrons" whose principal business it was to handle "fighting brands" and solicit business from customers of competitors.

From soliciting agreements or discriminating against those dealers who handle goods of competitors.

From attacking the credit or business reputation of or the quality of thread dealt in by any competitor by false reports or insufficient warrant in fact.

From harassing or threatening to sue without sufficient legal provocation for infringements of trade-marks or brands.

From offering or giving secret rebates to any customers of competitor.

From selling or offering to sell thread below the cost of production, or at lower prices in one section of the United States than in another, after allowing for transportation and differences in the quality, grade, or quantity sold with the intent thereby to obtain a monoply, but with the exception that they may meet bona fide competitors' prices, and may make different prices, etc., to different classes of customers. (The phraseology of this is almost the exact language of section two of the Clayton law.)

From offering free goods to customers in excess of 5 per cent of such purchases at any one time.

In another case under the Sherman law, United States *v.* American Coal Tar Product Company, a decree was entered in March, 1913, wherein the defendant was enjoined among other things:

From entering into any contract or arrangement with a competitor, a producer of coal tar, whereby such producer was restricted to whom he should sell, or the territory in which or the price at which such product shall be sold.

From making any agreement or enforcing any contract whereby the purchaser of one line of material should be required to buy from defendants or allied interests any other product.

From keeping secret their interest in other companies.

From, with the intent to injure the business of a competitor, selling its products at a less price to customers of competitors than to its own customers.

The decree in the case of United States *v.* General Electric Company, entered in 1911, was to much the same effect as that entered against the American Coal Tar Product Company. The judgment rendered in the case of United States *v.* Central West Publishing Company, *et al.*, in 1912, followed the general lines of the Thread case with some special features specially applicable to the particular business involved. The use of the term "unfair" appears in this decree in connection with some of the practices enjoined. It is understood that some or all of the defendants in this case have recently been cited for contempt for violating the terms of this injunction. Fictitious or "wash sales" and the fixing of prices were enjoined in the decree entered in United States *v.* Elgin Board of Trade in 1914 in a suit under the provisions of the Sherman law. A very recent case under the Sherman law involving the fixing of retail or ultimate prices is that of the United States *v.* Kellogg Toasted Corn Flakes Company, wherein the defendants are enjoined from requiring by "any agreement or understanding" jobbers or retailers to maintain the price fixed by the defendants. The relief prayed for by the Great Atlantic and Pacific Tea and Coffee Company *v.* Cream of Wheat Company, that defendant be enjoined from refusing to sell plaintiff cream of wheat for the reason that plaintiff declined to maintain the retail price was denied recently in a suit brought under the Clayton law. So it appears that a merchant or manufacturer is not required to sell his product but if he does sell it he can exercise no further control over it.

One of the most comprehensive decrees which it has been our privilege to examine, which indicates the extent to which the federal courts will go in preventing unfair competition under the Sherman law, is that entered in the recent case of United States *v.* S. F. Bowser & Company, *et al.*

In this case the defendants are enjoined:

From making or causing to be made to customers, present or prospective, false representations concerning the standing or business methods of competitors, with the intent to injure such competitors in business; and from like representations concerning the product of competitors.

From threatening to bring suits for alleged infringements of patents, not founded in good faith, against competitors or their customers.

From hiring or bribing individuals or public officers to use their influence in

promoting sales of defendants' product or in preventing sales of competitors' product.

From procuring parties to take employment with competitors for the purpose of securing information.

From inducing or hiring any person to secure names and addresses of competitors' customers. Defendants' own traveling men or employees may supply such information, if the purpose is not to injure the business of a competitor.

From securing or attempting to secure cancellation of orders secured by competitors.

From promising or agreeing to indemnify customers or prospective customers from losses from litigation, on condition that they cancel contracts with competitors.

From reducing the price of their product below cost of production, or giving it away, in order to prevent sales by competitors; or discriminating in price between different persons or localities with the purpose or intent to injure the business of competitors.

From hiring away the employees of competitors.

From committing or causing to be committed any other similar acts of unfair competition, the purpose or intent of which shall be to injure or destroy the business of any competitor, to substantially lessen competition in the product or otherwise restrain interstate trade or commerce, or tend to create a monoply therein in favor of defendants.

These are not by any means all of the decrees entered in suits by the government under the provisions of the Sherman law. Sufficient cases have been cited to make it plain that most unfair methods of competition have been the subject of condemnation under the provisions of that law.

Four Sections of the Clayton Law

Four sections of the Clayton law make unlawful an attempt to define certain practices which might very properly be denominated unfair methods of competition.

These sections raise in a slightly different manner the question as to whether these sections are supplementary to the unfair methods of competition section of the Trade Commission law or whether they supercede and control its application. The trade Commission law is not an anti-trust law and was passed September 26, 1914. We have considered the relation of unfair competition to the Sherman law. The Clayton law was passed October 15, 1914, and is an anti-trust law, described as being supplementary to the Sherman law. Having at a later date defined and made unlawful certain unfair methods of competition, did Congress there-

by restrict the Trade Commission to violations of the Clayton law? This is interesting speculation which will likely have to be finally determined by the courts. By the same token, did Congress narrow the application of the Sherman law?

Section two of the Clayton Act is in almost the exact terms of part of the decree in the Thread case above quoted. Discrimination in price where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce" is made unlawful. Exceptions are made for differences in grade, quality, or quantity, cost of selling or transportation, or made in good faith to meet competition. Nothing contained in this section is by its provisions to be held to prevent anyone engaged in commerce from selecting his own customers. In other words, a manufacturer may refuse to sell to a retail merchant because such retail merchant cuts the price, has bad teeth, red hair, or for no reason at all. Some very interesting questions here arise. For instance, how much must competition be lessened in order to be "substantially lessened"? Where is the mark which will tell when prohibited acts "tend to monopoly"? What is good faith competition? These terms are nowhere defined.

Section three of the Clayton Act makes so-called "tying contracts" illegal. These are the devices used which require a dealer to buy all of his goods or machinery of a certain kind from a particular vendor to the exclusion of all goods of competitors. This is usually accomplished by offering certain discounts or rebates from the price under other circumstances. This is now unlawful where the effect "may be to substantially lessen competition or tend to create monopoly in any line of commerce." The same questions arise here as appear in the consideration of section two of the act.

Section seven of the Clayton Act relates to intercorporate stockholding, the holding of stock by one corporation engaged in commerce in another corporation engaged in commerce. "Commerce," of course, means interstate trade or commerce. Such stockholdings and the voting of the same by proxy or otherwise are made unlawful when the effect thereof may be "to substantially lessen competition" between the two corporations, "or to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce." The same difficulty for want

of a definition of terms is here, also, as in the other sections mentioned.

Section eight of the Clayton law does not become operative until October 16, 1916. It makes unlawful interlocking or common directors in corporations engaged in whole or in part in commerce, any one of which has capital, surplus, and undivided profits aggregating more than one million dollars. A director elected not in contravention of the terms of this law continues a lawful director for one year thereafter, notwithstanding changes in the status of the corporation may occur after his election which would otherwise disqualify him. The exception to the operation of this section is that such corporations are not nor have been "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws." More trouble.

> For a charm of powerful trouble,
> Like a hell-broth boil and bubble.
> Double, double toil and trouble;
> Fire, burn; and, caldron, bubble.

Enforcement of Clayton Law Sections

By the provisions of section eleven of the Clayton Act, the Trade Commission is given authority to enforce these four sections of that law. The procedure is practically the same as that provided in the Trade Commission law for the prevention of unfair methods of competition and will be hereafter considered.

Two very important points are, however, to be noted here. One of these relates to the increased authority for suits by injunctive process by persons, firms, corporations, or associations against "threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act." This authority is found in section sixteen of the Clayton law.

One of the generally admitted defects of the Sherman law was that its sole enforcement was lodged with the attorney general of the United States. While ever so conscientious, the physical limitations upon the activity of one man, the varying moods of Congress in the matter of appropriations for the Department of Justice, and other considerations, left this law without serious attempts to en-

force it at times, while on other occasions it was vigorously prosecuted. Few, if any, sound reasons can exist for denying to the individual directly affected such relief in the courts from unlawful conduct as his protective instincts suggest that he pursue. True, the individual had his action for damages in threefold but in practice that has been poor comfort and of doubtful success.

Now, the individual need not wait upon the processes of the government. Federal courts are open to him everywhere. Jurisdiction may be had wherever the offender does business. In effect, this authority names and commissions as law enforcing officers the competitors of every business enterprise engaged in interstate commerce, not only as to the provisions of the Sherman law but includes the provisions mentioned of the Clayton Act as well.

A further point to be noted in this connection is the authority of the Attorney General of the United States with reference to the mentioned sections of the Clayton Act. His authority is given by section fifteen of this act and is a general power "to prevent and restrain violations of this act." In view of the special authority conferred in the same act upon the Federal Trade Commission to enforce the provisions of the mentioned four sections of the Clayton law, the serious question arises: Does this restrict the power of the Attorney General, and is he without authority to proceed in any manner to enforce the provisions of these four sections of the Clayton law? Evidently, he thinks not for he has recently begun a proceeding to enforce the provisions of section three of that act against a corporation alleged to be violating its provisions. Perhaps the courts will soon be called upon to pass on the question.

Procedure of the Federal Trade Commission

The methods of procedure and the provisions for enforcing the orders of the Trade Commission with respect to unfair methods of competition and the described four sections of the Clayton law are identical with this exception. Under the-unfair-methods-of-competition section of the Trade Commission law appears this clause: "and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public." This clause was put into the act in conference between the two Houses of Congress.

It becomes important to ascertain, if possible, what this term

"interest of the public" means. Is it congressional rhetoric or has the phrase a real meaning in law? Is it a legal light unto the feet of the commission or is it a stumbling block which unless carefully guarded against will wreck the real intentions of those who earnestly advocated this section of the Trade Commission act?

The determination of these questions is vital; necessary to an understanding of the act itself and of what is of much greater import, the protection of the rights of the individual, corporate or sole, and saving the commission to the useful purposes contemplated by the passage of the act.

Let there be no confusion as to the issue raised by these questions. Either this clause has a real legal meaning or Congress has attempted to lodge with five men the power of making fish of one man, fowl of another and red herring of the remainder; has attempted to give the commission the power to make "popular prosecutions of unpopular trusts" or individuals; the power to select for its target those unfortunate enough to have incurred administrative displeasure; or power to protect those who by ingenuity, influence or favor are able to cover up their transactions.

In my opinion, Congress never intended any such result as the alternative set out would indicate. We are proud of proclaiming that this country's government is a government of law and not of men. I decline to believe that we have suddenly changed or are likely to change this principle, despite the frequent assaults upon it.

Congress having defined certain unfair practices and having omitted to define other conceivable methods which might tend to monopoly or obstruct the free flow of honest competition, it may be that it had in mind, that as to these others which might come to the attention of the commission, that the commission would conduct a full inquiry if it felt that a certain practice or method was against public policy or the public good, and report its conclusions to Congress with a view of having added the new class in the definitions against unfair trade practices. Such inquiries might make the commission a very useful source of information to Congress and the public.

This viewpoint is further supported by the process adopted in the law for carrying out the judgment or order of the commission. Its order is primarily against a thing, a practice, a

method, and while its findings and conclusions may be as condemnatory as you can well imagine, still such order does not assume a personal aspect until it has been passed upon by the Circuit Court of Appeals, when it becomes the court's order, the court's judgment, and then a violation of such judgment becomes a contempt of the court, but not a contempt of the commission.

We are not left, however, to the reason of the thing or to the ordinary and well known rules of statutory construction.

Many courts have spoken upon analogous questions. It was said in a leading case in Massachusetts, Massachusetts *v.* Strauss, 191 Mass. 545, 78 N.E., 136, 11 L.R.A. N.S., 968, construing a Massachusetts statute very much like section three of the Clayton law, that the act was constitutional and expressed due public policy and interest.

"Public policy" and "public interest" are conceived to be, if not the same thing, most distinctly analogous. A long line of most impressive court decisions have said: "By 'public policy' is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the 'policy of the law'." Another court has said that: "Public policy is but the manifest will of the state," Jacoway *v.* Denton, 25 Ark., 625.

It is the "manifest will of the state" that unfair methods of competition shall cease, else Congress would not have gone to the trouble to make them unlawful. Not only are unfair methods of competition in commerce made unlawful, but "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations from using unfair methods of competition in commerce."

We have not only the expression of the "manifest will of the state," but we have certain things which are believed to be "injurious to the public or against the public good" made unlawful by the solemn declaration of the supreme legislative power of the country. We have the creature of that legislature solemnly authorized and directed to prevent the things which have been by the legislative will determined to be against the public good, which is the same thing as the public interest, or in the language of this law "to the interest of the public."

The procedure set forth in the law is that the commission acts

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.

It now becomes important to consider the phrase, "reason to believe." The commission's announced rule of practice reads:

The commission shall investigate the matters complained of in such application, and if upon investigation the commission shall have reason to believe that there is a violation of law over which the commission has jurisdiction, the commission shall issue and serve upon the party complained of a complaint stating its charges . . . . .

This and the preceding paragraphs of this rule of the commission seem to make it plain that the view of the commission is that action upon alleged violations of the unfair competition section of the Trade Commission law and of the four sections previously mentioned of the Clayton Act is not to be had as a matter of right but as a matter of grace. The procedure set forth in the Clayton law does not contain the phrase "in the interest of the public." This conclusion is reached from the use in the announced rule of the words "such application," and "may apply." However, it has not yet been ascertained in practice just how far "upon investigation" the commission will go before determining to issue a complaint. It is not yet known whether this investigation goes to the extent of investigating the alleged facts before determining to issue a complaint or merely making an investigation to see if the alleged facts charge or "give reason to believe" that there has been a violation of the law.

It can hardly be expected that the commission will be able to acquire in some unexplained manner the wireless emanations of thought and judgment of the business world and the public at large so as to enable it to have both the "reason to believe" and knowledge that the inquiry would be "to the interest of the public." Certainly, some more tangible and direct method must be determined upon.

Will the "reason to believe" that violations of law have been practised or are going on and that an inquiry would be in the "interest of the public" be determined by the commission from a reading of the individual "applications" or complaints? What effect would a hundred such complaints or "applications" have on the

judgment of the commission as to whether or not a proceeding would be to the interest of the public? Or again, what of one complaint setting forth a hundred instances of unfair practices, outlining perhaps a dozen different methods of competition, all alleged to be unfair? Suppose five hundred complaints alleging and describing, perhaps, twenty violations of law and mentioning say one hundred defendants are individually lodged with the commission, how is the commission to satisfy each one of the complainants that he has a day in court? To the complainant, as every lawyer knows, his case is the only case in the whole world worthy of attention. It is a fixed principle of justice that every suitor must have an opportunity to make good his complaint and unless he has such opportunity he has good right to complain.

True, some of these complaints will be filed by individuals actuated by the old time motive that "'Tis pleasant sure to see one's name in print"; others will be friendly attempts to get a ruling or a declination from the commission which may later be used as an O. K. to the business method involved. How are these problems to be met by the commission?

We have laws against assault and battery but it does not require a riot in order that the "public interest" be asserted by the public prosecutor, or the judge, or the justice of the peace. This still leaves the individual his common law right for damages. Just so action by the commission is not exclusive. The complainant has the right at any time to proceed to the assertion of his rights in the courts regardless of the commission's action or failure to act.

The power of the commission is judicial to assume jurisdiction of the complaint of anyone who complains that unlawful means within the control of the commission and denounced by the law are being used against him. Is this not a right which the complainant has which the commission must respect? It has been stated by the Supreme Court of the United States, In re Hollon Parker, 131 U. S., 221 that: "Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise." I think it sound law that any action in connection with a judicial or quasi-judicial proceeding for which there is no legal excuse is subject to the certain control of the courts.

The legal principle which is applicable to all cases presented to the commission in connection with unfair practices under either

the Trade Commission law or the Clayton Act is well set forth in Humbolt Steamship Company *v.* I. C. C., 224 U. S., 474, wherein it is declared: "It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion."

I seriously question the authority of the commission to decline any complaint alleging facts constituting in law unfair competition or unfair methods of competition in interstate commerce. The civic consequences of any other course as well as the announced rules of law and the well known principles of statutory construction constrain me to this opinion. This does not mean that the commission may not in the interest of justice and the prompt and orderly dispatch of public business bunch both complainants and defendants, thus bringing into one case varying viewpoints and interests to the determination of a correct principle touching the questioned method.

Court Review of Commission's Orders

Except by voluntary acquiesence, the orders of the commission become effective only after having been passed upon by the Circuit Court of Appeals. This court is required to give such cases precedence.

All judicial power is lodged in the Supreme and inferior courts established by Congress. For this reason, the orders of the commission must pass in review by the courts. Judges hold their office during good behavior. Members of the commission hold their office for a term of seven years.

The question arises, may the orders of the commission be made conclusive upon the courts to the extent attempted, that is, in its findings of fact, if supported by testimony?

This is called the narrow court review and is assumed to be based upon the decisions under the Hepburn Amendment to the Interstate Commerce Commission law. In short, these decisions hold that the court will not review these rulings so long as it appears that the commission was acting within its jurisdiction. But as was said by a very distinguished advocate of the commission law on the floor of the Senate, Senator Cummins, speaking to the point of giving to the Trade Commission authority to announce rules for future conduct:

I doubt whether we could constitutionally do it, because there is a difference between prescribing a rule for business so far as competition in commerce is concerned, and prescribing a rate which a common carrier may charge for its service.

Undoubtedly, there is a very marked distinction between interstate carrier transportation by common carriers and trading by those engaged in general industry, even though such trading may be in interstate commerce. Common carriers are affected by a public interest. The regulation of their rates is but a function of government. The conduct of trade is not yet regarded as a function of government; particularly not of the federal government. This distinction yet exists, although Congress derives whatever power it has over either subject from the same words in the Constitution.

As the bill passed the Senate the provision for court review was almost identical with that provided in the Hepburn Amendment to the Interstate Commerce law, but the provision was redrafted and considerably modified in conference in a further attempt to narrow its provisions.

The question is a very difficult one and probably can be only a matter of speculation until the provision has been reviewed in the courts.

Administrative Powers of the Commission

The commission makes its own rules of practice and on direction of the President or either House of Congress conducts investigations and makes report of its findings of fact with reference to any alleged violations of the anti-trust laws by any corporation. The limitations and use of this power appear from its mere statement. The former powers of the Bureau of Corporations, which bureau the commission took over, with respect to general investigations, although in the bill as it passed the Senate, were carefully elided in conference. The substitution of carefully defined powers of investigations was made. Probably, economic investigations which have heretofore been conducted by committees of Congress will in the future be made by the commission on request.

Upon request of the Attorney General the commission has power to investigate and report how any business charged with violating the anti-trust laws may readjust its business in conformity with the law. This power is likely to be little used.

An impression seems to exist in some quarters that the commission has power to act as a "little father" to business, and while having the power to chide it, may also grant it absolution with instructions how to avoid sinning further. This was distinctly disavowed by distinguished advocates of the measure and an amendment to this effect was voted down in the Senate of the United States. It is further provided in the law that "Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the anti-trust acts or the acts to regulate commerce," nor "to alter, modify, or repeal the same or any part thereof."

The commission may act as master in chancery for any court trying an anti-trust case, which court may, on the conclusion of the testimony, refer the matter to the commission for drafting and reporting an appropriate form of decree.

It may investigate on its own motion the manner in which any decree in an anti-trust case is being carried out, and on the application of the Attorney General it must so act, and transmit to him its report and recommendations and may make such report public in its discretion.

The commission is authorized to investigate trade conditions in and with foreign countries. But this authority is limited to those foreign countries "where associations, combinations, or practices, or other conditions, may affect the foreign trade of the United States." The phrase "or other conditions" probably opens wide the door for this kind of activity anywhere. On these investigations it is to report to Congress with recommendations.

The commission has authority to provide for the publication of its reports and decisions and to make public from time to time such information as it may acquire, "except trade secrets and names of customers." Names of customers are a trade secret.

Commission Powers With Respect to Corporations

"Corporation," as defined by the act, is any company or association, with or without shares of capital stock, which is organized to carry on business for its own profit or that of its members, except partnerships. Partnerships were excluded, perhaps, from the doubtful constitutionality of the exercise of the

contemplated visitorial powers of the act; even though such may be, and often are, important factors in interstate commerce.

The commission is authorized to require annual or special reports from corporations engaged in interstate commerce, other than banks and common carriers. It may gather and compile information concerning the organization, business, conduct, practices and management of corporations and inquire into their relations to other corporations, individuals, associations and partnerships.

While reports and inquiries of this character are ofttimes very illuminating and to the student very interesting, quite frequently they add little to the general sum of knowledge available in other forms.

The question arises, would it not be more to the public interest to secure a really useful uniform and regular report from corporations engaged in interstate commerce and make all these at once available to the public and leave special studies to special occasions as they may arise? Unless such reports are made immediately open for public use, there is grave danger in a mass of reports being made a rampart behind which delays or inactivities of the commission might retire, secure from public gaze.

This character of reports may be provided by the proper exercise of the powers confided to the Trade Commission by this law. Honest business, which is most business, will welcome the chance to deposit in some central place the proper public facts with reference to its industry.

The determination of a standard form of report may well become the subject of careful joint consideration by the commission, the accounting officers of corporations, the officials of states who have to do with corporate reports, public accountants, and economists, "those geologists of politics."

While it has often been talked of in this country, no real substantial means has ever been arranged for utilizing the force of public opinion in combating the abuses of corporate combinations. It may be, that this provision for corporate reports may supply that omission. The manner of its administration will be awaited by corporate managers, investors, and the general public with interest.

As a means to an end, as a means of proper publicity of inter-

state activities of corporations engaged in commerce, of fact finding, of public information, and at all times acting under the terms of exact and well considered law and with a full appreciation of public responsibility, in our present situation, such a commission as is authorized by this law can be very useful. As earlier pointed out, a distinct peril, not only to the commission itself but to the interests affected by it, lies in the multitude of its duties and the conglomerate nature of its powers.